

SOMERS ZONING BOARD OF APPEALS

APPEAL OF JULY 1, 2002 ZONING ENFORCEMENT OFFICER ORDER

MARCH 1, 2021

MEMORANDUM OF LAW

FACTS

The Union Agricultural Society (UAS) owns five parcels of property on Egypt Road in the Town of Somers, totaling 68.75 acres. **Ex A-1.** Part of the UAS property is located in the A-1 residential zone and part of the property is located in the I Industrial zone. **Ex A-2.** The UAS purchased five parcels of property over a period of time between 1960 and 2014. **Ex B-1 through B-9.**

The UAS property abuts a 30-lot single family residential subdivision known as Sunshine Farms. **Ex A-1.** The Sunshine Farms subdivision is located in the A-1 residential zone. **Ex A-2.**

On July 1, 2020 the Zoning Enforcement Officer (ZEO) issued an Order. The Order indicates that:

"The referenced property [UAS property] has been used as a venue for various events, including the sale or distribution of alcohol since its purchase in 1960...I have determined that such use of the property is a legal non-conforming use. Therefore, no Special Use permit is required." **C-10.**

On July 10, 2020, the Sunshine Farms neighborhood appealed the ZEO's July 1, 2020 Order. **C-19.**

At the Zoning Board of Appeals (ZBA) February 18, 2021 hearing, the ZEO testified that the "various events" she referred to in her July 1, 2020 Order included a wide variety of uses, a list of which was supplied to her by the UAS. Most of the uses are contained on UAS List of Exhibits ZBA Hearing February 9, 2021 in Numbers 7 through 24.

In addition to the uses listed, annually the UAS properties host two agricultural fairs; The Four Town Fair and the 4-H Fair. The two agricultural fairs were not part of the ZEO's July 1, 2020 order and are not part of this appeal. **C-10, C-19.**

At the February 18, 2021 ZBA Hearing the ZEO was asked if each of the events on the list of events received from the UAS conformed to all then existing zoning requirements when they occurred? The ZEO responded that she was not

the ZEO at the time those events occurred. When asked if her answer meant she did not know, she repeated that she was not the ZEO at the time those events occurred.

LAW

The uses are not permitted

"Zoning ordinances are either 'permissive' or 'prohibitive'. Most regulations are the former type where a use is automatically excluded unless it is expressly permitted in the zoning regulations. Under the prohibitory type of ordinance, uses are allowed except those expressly prohibited. To avoid uses being allowed by mistake, most municipalities have the permissive type of ordinance. In addition to uses which are expressly allowed in the ordinance, the regulations for each district may contain provisions allowing uses only with special permits granted by the commission." *Connecticut Practice Series Land Use Law and Practice sec. 4:10.*

The Zoning Regulations for Somers are permissive. (See Sec. 214-5)

Sec. 214-5 Prohibited Uses – Uses that are not expressly permitted are prohibited. Section 214-5 **Ex D-6**

By listing uses that are allowed in the zone, the Somers Zoning Regulations prohibit any use not expressly authorized in the zone. Gada v Zoning Board or Appeals 151 Conn 46, 48; Bradley v Zoning Board of Appeals 165 Conn 389, 394. *Connecticut Practice Series Land Use Law and Practice sec. 2:2.*

None of the uses listed on the UAS List of Exhibits, Numbers 7 through 24 are permitted as of right in the A-1 Residential District. Some of them might be permitted pursuant to a Special Use Permit, while other uses are prohibited.

None of the uses listed on the UAS List of Exhibits, Numbers 7 through 24 are permitted as of right in the I Industrial District. Some of them might be permitted pursuant to a Special Use Permit, while other uses are prohibited.

The uses are not pre-existing nonconforming

Nonconforming use is a term that is defined within the zoning regulations. (see Sec. 214-4)

Sec. 214-4 Nonconforming Use, states

“A use of any land, building or structure which does not conform to all of the applicable requirements of these regulations but which, when commenced, conformed to all then-existing zoning requirements.”

The usage of terms defined within the regulation are addressed in Sec. 214-3

Sec. 214-3 Word Usage, states:

“For the purpose of these Zoning Regulations, the following terms, phrases, words and their derivations shall have the meanings given therein.”

At the beginning of the February 18, 2021 ZBA Hearing, the ZEO was asked twice if each of the events on the list of events she received from the UAS conformed to all then existing zoning requirements when they occurred? Based on her response, it is clear that she did not know if they conformed to all the existing zoning requirements.

Unless the “various events” included in the ZEO’s July 1, 2020 Order “conformed to all then-existing zoning requirements”, they cannot be non-conforming uses. (See Sec. 214-4)

Many of the uses have been discontinued or abandoned

In accordance with the zoning regulations, the uses listed on the UAS List of Exhibits ZBA Hearing February 9, 2021 are not permitted uses. In addition, those uses are not nonconforming uses. Assuming arguendo that they were nonconforming, by this point in time, they have been discontinued or abandoned.

Exhibits D-1 through **D-6** are copies of the Somers Zoning Regulations from 1955 to the present.

Section 3 b. of the 1955 Zoning Regulations states:

“b. Non-Conforming Uses: No non-conforming use which shall have been discontinued for a period exceeding one year shall be replaced by any other non-conforming use.” Section 3 b. **Ex D-1**.

The same Non-Conforming Uses provision was also in the 1964 Zoning Regulations. Section 3 b. **Ex D-2**.

The same Non-Conforming Uses provision was also in the 1964 Zoning Regulations. Section 3 b. **Ex D-3**.

In the 1973 Zoning Regulations the Non-Conforming Uses of Land provision was contained in Section 9 B 3:

"3. If any such non-confirming use of land has been discontinued for a period of more than one year, any subsequent use of such land shall conform to the regulations specified by this regulation for the district in which such land is located." Section 9 B 3 **Ex D-4**.

In the 1986 Zoning Regulations the Non-Conforming Uses of Land provision was also contained in Section 9 B 3 and the language was the same as that in the 1973 Regulation. Section 9 B 3 **Ex D-5**.

In the 1990 Zoning Regulations the Non-Conforming Use provision was contained in Section 214-33:

"Any nonconforming use which has been voluntarily abandoned or discontinued shall thereafter conform to the provisions of these regulations. In determining whether a nonconforming use has been voluntarily abandoned or discontinued, the Commission shall examine various factors, including the length of the period of nonuse and the intent of the property owner. Section 214-33 **Ex D-6**

The UAS List of Exhibits ZBA Hearing February 9, 2021, items Number 7 – 24 is their list of various events that have occurred at the UAS property since it was purchased in 1960. The list includes forty-eight separate events.

Thirty of those events occurred prior to the 1990 Zoning Regulations being adopted. All thirty of those non-conforming uses of the UAS land were discontinued for a period of more than one year prior to the adoption of the 1990 Zoning Regulations. Pursuant to the language contained in the Zoning Regulations in effect at the time those thirty non-conforming uses occurred, all of them have been discontinued or abandoned because they have been discontinued for a period of more than one year.

As for the eighteen non-conforming uses that have occurred subsequent to the adoption of the 1990 Zoning Regulations, seventeen of them have been discontinued for periods of time in excess of twenty years. A reasonable application of the language contained in Section 214-33 the 1990 Zoning Regulations, would require that after a twenty-year discontinuance, any subsequent use needs to conform to the zoning regulations.

The one remaining non-conforming use was a beer and wine tasting and food truck festival in 2016. The UAS has failed to demonstrate why this non-conforming use should not conform to the Zoning Regulations.

These uses do not predate the adoption of the zoning regulations and they are not nonconforming, but, even if they were, by this point in time they have been discontinued or abandoned.

Impermissibly expanded

As discussed above, the uses listed on the UAS List of Exhibits ZBA Hearing February 9, 2021 are not permitted uses, nor are they nonconforming uses. Assuming arguendo that these uses were nonconforming, they have been discontinued or abandoned.

Further, assuming arguendo that these uses were nonconforming and they had not been discontinued or abandoned, they would have been impermissibly expanded.

According to the UAS List of Exhibits ZBA Hearing February 9, 2021, over the years, the property has hosted a wide variety of uses everything from motorcycle racing to helicopter rides; from Mud Bog to Boogie Bash. The uses changed year to year; however, all of them were nonconforming.

That pattern has continued right up until the time of the ZEO Order. **Ex E-7.** Copper Hill Music & Culture Festival is the latest planned non-conforming event, complete with bands from 12 to 12 on Saturday, camping, local beer, food trucks. For the Sunshine Farms neighborhood, this non-conforming use amounts to 12 hours of sounds with decibel levels high enough to cause permanent damage to human hearing. **Ex E-7.**

The zoning regulations prohibits this revolving door of different non-conforming uses.

Sec. 214-28 Change of use, states:

“A nonconforming use may be changed only to a conforming use.”

If the UAS were to argue that Copper Hill Music & Culture Festival is an extension or enlargement of the non-conforming use listed as beer and wine tasting and food truck festival listed as Number 23 on the UAS List of Exhibits ZBA Hearing February 9, 2021;

Sec. 214-29 Extension or Enlargement, states:

“No nonconforming use shall be extended or enlarged inside or outside any building or structure...”

“In deciding whether the [proposed] activity is within the scope of a nonconforming use consideration should be given to three factors (1) the extent to which the [proposed] use reflect the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in the effect upon the neighborhood resulting from

differences in the activities conducted on the property.” Zachs v Zoning Board of Appeals 218 Conn 324, 589 A 2d 351

1. In this case there is a wide variety of events. Everyone of the events is unique. None of them involve the same parties or activities as whichever one of the events the UAS maintains is the original use.

2. The character, nature and kind of each one of the 48 uses listed on the UAS List of Exhibits ZBA Hearing February 9, 2021 is substantially different from the other uses.

3. The effect upon the neighborhood resulting from the differences in the activities conducted and to be conducted on the property is substantial.

Assuming arguendo that these uses were nonconforming, by this point in time they have been discontinued or abandoned. Further, assuming arguendo that these uses were nonconforming and they had not been discontinued or abandoned, based on the foregoing they have been impermissibly expanded.

The Equitable Defense of Municipal Estoppel does not apply

The UAS has claimed that ZBA can consider the doctrine of Municipal Estoppel in deciding this appeal. There are a number of reasons why Municipal Estoppel does not apply in this situation.

1. Municipal Estoppel is merely an equitable defense to municipal action.

Municipal Estoppel is a shield, it is not a sword.

The estoppel doctrine may come up in an administrative appeal such as an appeal from an issuance of a cease-and-desist order, a declaratory judgment action, or as a defense in an action to enforce the zoning regulations. The property owner has the right to challenge the legality of the zoning ordinance as applied to his property in an appeal from the issuance of a cease-and-desist order. Helbig v Zoning Commission of Noank Fire Dist. 185 Conn 294.

The DeVeau¹ case was an appeal to the ZBA of a municipal cease and desist order. Municipal estoppel was raised in the DeVeau appeal in defense against the Town's action of issuing a cease-and-desist order.

No cease-and-desist order has been issued in this case. No declaratory judgment action or action to enforce the zoning regulations is pending. In fact, no

¹ Deveau v. East Haddam Zoning Board of Appeal 2005 WL 2854852, Superior Court J.D. of Middlesex

municipal action was taken against the UAS as a result of the ZEO's order. **Ex C-10.** The ZEO's decision in this case is that no action by UAS is necessary. The ZEO made a decision that "no Special Use Permit is required" by the UAS. **Ex C-10.**

Similarly, the 2007 ZBA decision in the Marie Teresa Demers matter was an appeal of a cease-and-desist order. A variety of defenses were raised at the ZBA hearing. Municipal estoppel was not cited by the ZBA as the reason it overturned the cease and desist. Like the DeVeau case, the Demers matter is distinguishable from this case. No municipal action was been taken against the UAS as a result of the ZEO's order. **Ex C-10.** No cease-and-desist order has been issued in this case. No declaratory judgment action or action to enforce the zoning regulations is pending. The ZEO made a decision that "no Special Use Permit is required" by the UAS. **Ex C-10.**

2. The requirements for the application of Municipal Estoppel are not present.

"To summarize, in order for a court to invoke municipal estoppel, the aggrieved party must establish that: (1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act on that belief; (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) the party had changed its position in reliance on those facts; and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents. Cortese v. Planning and Zoning Board of Appeals, 274 Conn 411, 420." DeVeau v East Haddam Zoning Bd of Appeal 2005 WL 2854852.

The Court in the DeVeau, refused to apply the municipal estoppel defense, finding a lack of evidence upon which it could make a finding that the appellant lacked knowledge of the true state of things and had no convenient means of acquiring that knowledge.

"The contours of the application of the doctrine of municipal estoppel to zoning regulations are well established in our jurisprudence. [I]n special circumstances, a municipality may be estopped from enforcing its zoning regulations... In municipal zoning cases, however, estoppel may be invoked (1) only with great caution, (2) only when the resulting violation has been unjustifiably induced by an agent having authority in such matter, and (3) only when special circumstances make it highly inequitable or oppressive to enforce the regulations... Moreover, it is the burden of the person claiming the estoppel to show that he exercised due diligence to ascertain the truth and that he not only lacked knowledge of the true state of things but had no convenient means of acquiring that knowledge..."

In this case, even if Municipal Estoppel could be applied, the facts don't meet the strong burden that the UAS has to satisfy. There is no unjustifiable inducement by a municipal agent. There are no special circumstances that make it highly inequitable or oppressive to follow the zoning regulations. The UAS has known since before the Order was issued that they needed a Special Use Permit in order to host the uses they intended for their property. **Ex C-1, C-2.**

3. The ZBA is required to hear and decide appeals where it is alleged there is an error in any order.

Sec. 214-110 states that the ZBA shall hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of the zoning regulations in accordance with *CGS section 8-7*. The ZEO's July 1, 2020 Order is in error. The Order states that "various events" are nonconforming uses, when they are not. (see Sec. 214-4). **C-10** Municipal Estoppel will not change that fact.

As there is an error in the ZEO's Order, *CGS 8-7* empowers the ZBA to reverse or modify, wholly or partly or modify any order, requirement or decision as in its opinion should be made.

CONCLUSION

On March 4, 2020, the ZEO wrote a letter to the UAS advising them that based on the zoning regulations that they needed to apply for a Special Use Permit. **Ex. C-1.** On March 13, 2020 the UAS submitted an Application for Special Use Permit. **Ex. C-2.** Public hearings on its application were held on May 4, 2020, June 1, 2020 and July 6, 2020. **Ex. C-4, 5, 6, 7, 8, 9, 16, 17 & 18.** The UAS was on the path laid out in the zoning regulations regarding their proposed uses.

The proposed uses are not preexisting nonconforming uses. Even if they had existed prior to the adoption of the zoning regulations, they have long since been discontinued or abandoned. And even if they had not been discontinued or abandoned, they have been enlarged or expanded past the point of reasonableness. No person living in a residential neighborhood should be required to listen to 12 hours of rock music, mud bog or military helicopters taking off and landing from an adjacent property.

Respectfully, the ZBA should reverse or modify, wholly or partly the ZEO's July 1, 2020 Order and get the UAS back on the path laid out in the zoning regulation.

SUNSHINE FARMS NEIGHBORHOOD

BY



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